

EXHIBIT 2

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In accordance with a protective order, the enclosure(s) shall be treated as confidential and shall not be shown to any person other than those persons designated in paragraph 8.2 of the paragraph order.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

-----:
CUSTODIA BANK, INC., :
:
Plaintiff, :
: Case No.
vs. : 1:22-cv-00125-SWS
:
FEDERAL RESERVE BOARD OF :
GOVERNORS and FEDERAL RESERVE :
BANK OF KANSAS CITY, :
:
Defendants. :
-----:

CONFIDENTIAL DEPOSITION OF
PETER CONTI-BROWN, PH.D.

DATE: Thursday, December 14, 2023
TIME: 8:09 a.m.
LOCATION: King & Spalding, LLP
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
REPORTED BY: Erick M. Thacker
Reporter, Notary

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1 Q Irrespective of which state's issuing
2 the charter?

3 A That's right.

4 Q And even irrespective of whether it's a
5 territory issuing the charter, correct?

6 A I understand in the banking laws that
7 state is defined to include the District of
8 Columbia and the territories of the United
9 States.

10 Q Okay. And this access would be
11 irrespective of whether the state-chartered
12 depository institution has insurance, right?

13 A There I would say whether it has
14 eligibility to apply for insurance, but
15 irrespective of whether that insurance has been
16 received.

17 Q Okay. And the access would be
18 available -- the Fed's priced services would be
19 available irrespective of whether the institution
20 presented risk to the federal payment system?

21 A The -- I'm trying to think through that
22 question as it relates to my answer earlier about

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1 the discount window. Certainly, it is the case,
2 as we have seen recently in the spring of 2023,
3 that the Federal Reserve has cut off insolvent
4 institutions from access to its services, and I
5 don't express the opinion that they have done so
6 inconsistent with the intentions of the framers
7 of the MCA when they acted in that way.

8 So if that -- if we take your question
9 about risk to include situations where a legally
10 eligible depository institution has become
11 insolvent, then I would think that risk is
12 relevant to -- to that question.

13 To the extent that it is giving the Fed
14 discretion to block legally eligible depository
15 institutions, then I would say that that -- that
16 that discretion was not -- is inconsistent with
17 the intentions of the framers of the MCA.

18 Q So your bottom line is that a
19 state-chartered depository institution that's
20 legally eligible can get access to the Fed's
21 priced services even if doing so presents risk to
22 the payment system?

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1 A That is my opinion, yes.

2 Q Okay. And is it also your opinion that
3 a legally eligible, state-chartered depository
4 institution can get access to Fed services even
5 if doing so would hinder the Fed's ability to
6 implement monetary policy?

7 A That is my opinion, yes.

8 Q And it's your opinion that that was
9 what was intended by Congress in 1980?

10 A Yes. Now, there are -- there were
11 discussions in -- in the late fall of 1979 and
12 winter of 1980 that preceded the passage of the
13 MCA that were focused on the ways that the regime
14 that preceded the MCA had complicated efforts for
15 monetary policy. That explains the motivation
16 for the equalization treatment that the MCA
17 framers intended, but the MCA discussion did not
18 include discussion of prospective alteration of
19 that authority by the Federal Reserve
20 unilaterally to assist future changes in monetary
21 policy. That was a long answer to your question.

22 So the short answer is, I -- it is my

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1 opinion that the Federal Reserve does not have
2 the discretion to both define its monetary policy
3 space and then to exclude legally eligible,
4 state-chartered depository institutions from its
5 priced services in service of that monetary
6 policy space.

7 Q And do you understand that what -- what
8 Congress intended to accomplish in the Monetary
9 Control Act is -- is a legal dispute in this
10 case?

11 A No.

12 MR. SCARBOROUGH: Objection to form.

13 THE WITNESS: I don't understand that,
14 no.

15 BY MR. MICHAELSON

16 Q Okay. You -- you're a lawyer, right?
17 You went to law school?

18 A I did go to law school, yes.

19 Q And you -- you clerked for a judge,
20 two, correct?

21 A For two judges, yes.

22 Q For two judges. So how -- how do

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1 courts go about interpreting statutes?

2 MR. SCARBOROUGH: Objection.

3 THE WITNESS: I don't know how -- you
4 know, this is the subject of great scholarly
5 debate, how they do, how they should. Courts are
6 different in different ways.

7 I'm not offering -- the reason I
8 don't -- I didn't agree with your earlier
9 question is that I -- I offer my expertise here
10 as a historian of banking, and I'm not offering
11 an opinion on the legal interpretation of the
12 statute. And so the intentions of the statutory
13 framers, while maybe useful to the Court in terms
14 of interpreting specific provisions, my -- of
15 the -- of the statute, that I would regard as a
16 legal dispute.

17 What I'm offering is a perspective on
18 the Fed's history from 1913 to 1980, how members
19 of Congress and others understood the changes
20 that occurred in 1980, and then how the Federal
21 Reserve understood and implemented those changes
22 from 1980 to 2015, and then, finally, how it

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1 talking about here is from 1985, but what the
2 Federal Reserve would do here is block a
3 transaction that would represent a negative
4 balance or impose a negative balance on an
5 account holder.

6 I am not aware of the Federal Reserve
7 cutting off access to a master account on the
8 basis of an overdrawn account. I saw only
9 evidence of blocking individual transactions.

10 BY MR. MICHAELSON

11 Q Okay. But if -- if an institution --
12 if every transaction would put that institution
13 into a negative balance, then the Fed could block
14 every transaction, right?

15 A I -- again, I'm not speaking on what
16 the Fed could or can't do legally. I'm
17 commenting on what it did do, and I don't -- I
18 did not see an instance where a master account
19 holder repeatedly tried to overdraw an account.
20 I didn't see that at all.

21 Q Well, but you wouldn't have visibility
22 into that, right?

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1 A I would -- I did not have visibility.
2 I might have if -- I read through all of the
3 newspaper coverage of -- during the period, so if
4 it became a question of -- of press reports,
5 which bank failures and incursions with
6 regulators often do, that would have shown up.
7 But I didn't -- I don't -- I didn't have access
8 to any of that private information.

9 Q Okay. Let's -- let's actually --
10 you've never worked for the Federal Reserve,
11 correct?

12 A That's right.

13 Q Never worked for the Board of
14 Governors, correct?

15 A That's right.

16 Q Never worked for a Reserve Bank?

17 A That's right.

18 Q Never worked for the FOMC?

19 A That's right.

20 Q You did obtain through this case access
21 to some internal Federal Reserve materials that
22 were subject to discovery in this case, correct?

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1 A That's right.

2 Q So -- but aside from the discovery in
3 this case that you received, is your opinion
4 based on solely public information?

5 A Public information meaning available,
6 like on a Google search kind of thing?

7 Q Well, just information that's -- that's
8 not confidential to the Federal Reserve System.

9 A Sure. Yes. In that sense, yes --

10 Q Okay.

11 A -- based on public information.

12 Q So there's no -- no internal
13 confidential Federal Reserve documents or
14 information that's informing your opinion other
15 than what you received in discovery in this case?

16 A Except that which has been disclosed
17 via FOIA or archival research or something like
18 that, but nothing -- no internal confidential
19 documents other than so described.

20 Q Okay. So I'd like to refer you to
21 paragraph 9 of your report. And you write,
22 "First, I conclude that the Board's claim of

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1 A That's right.

2 Q But it's also your opinion that from
3 1980 to 2015, the Federal Reserve asserted the
4 authority to terminate a master account holder's
5 access to services?

6 A That's right.

7 Q Okay. Let's go to page -- paragraph --
8 well, paragraph 42 is -- this is legislative
9 history concerning passage of the Monetary
10 Control Act?

11 A This is the testimony of fed chair --
12 then Fed Chair Paul Volcker discussing his view
13 on the proposed change of law, which he
14 supported.

15 Q And paragraph -- it sets the
16 legislative history of the Monetary Control Act,
17 correct?

18 A Yes. So I would regard that to be as
19 part of the legislative history, yes.

20 Q And paragraph 43 also contains
21 legislative history on the Monetary Control Act?

22 A That's right, testimony of one of the

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1 bill's sponsors.

2 Q Okay. And you -- you'd agree that the
3 presentation of legislative history on the
4 Monetary Control Act reflected in your opinion is
5 not complete, correct?

6 MR. SCARBOROUGH: Objection.

7 THE WITNESS: Can you define for me
8 what a complete legislative history would be?

9 BY MR. MICHAELSON

10 Q Well, isn't it the case that part of
11 the legislative history of the Monetary Control
12 Act reflects a concern among Congress that the
13 percentage of banks or Fed members was declining?

14 A That was the concern of some members of
15 Congress, no question.

16 Q All right. Federal membership was
17 declining, correct?

18 A That's right.

19 Q And that was a concern for banking
20 regulators, correct?

21 A For -- the decline in Fed membership
22 rates was a concern for some bank regulators, not

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1 all.

2 Q And what was the concern?

3 A The concern here was that in the fall
4 of 1979, the Federal Open Market Committee
5 launched a wholesale reorientation of its
6 monetary policy regime that required more
7 varieties of -- of efforts to control monetary
8 policy. And Paul Volcker's concern and the
9 concern of some others that the Federal Reserve,
10 although not a concern shared by all, was that
11 the ability to manage this new monetary policy
12 system was limited by the decline in Fed
13 membership.

14 Q And so -- so fair to say that
15 Volcker's -- well, Volcker's concern was that
16 declining Fed membership could impair the Federal
17 Reserve's ability to implement monetary policy?

18 A That's right.

19 Q And so one purpose of the Monetary
20 Control Act was to reinforce the Federal
21 Reserve's ability to implement monetary policy?

22 A That's right.

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1 Q And one way that it did that is by
2 empowering the Federal Reserve to impose reserve
3 requirements on depository institutions, correct?

4 A That's right.

5 Q Including state-chartered nonmember
6 depository institutions, correct?

7 A That's right.

8 Q In that sense, the Monetary Control Act
9 increased the Federal Reserve's authority over
10 the banking system?

11 A That's right.

12 Q Okay. And that's not reflected here in
13 paragraphs 42 and 43 of your report, correct?

14 A That's right.

15 Q Okay. Let's -- let's go to -- well,
16 sticking with paragraph 45 here, you write --
17 it's on the top of page 18 -- that no provision
18 of the Monetary Control Act exempts a particular
19 Federal Reserve payment service or indicates that
20 providing payment services would be a
21 discretionary matter with the Federal Reserve?

22 A Not that I saw either in -- either in

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1 any of the bills or in the ultimate statute that
2 they produced.

3 Q So referring to Exhibit 300, which
4 is -- which is 248a, under (c), subsection
5 (c)(2), there's a clause -- I'll direct your
6 attention to the clause at the end of (c)(2),
7 which says, "except that nonmembers shall be
8 subject to any other terms, including a
9 requirement of balances sufficient for clearing
10 purposes that the Board may determine are
11 applicable to member banks."

12 Do you see that?

13 A I do.

14 Q Doesn't that section give the Federal
15 Reserve discretionary authority over access to
16 services?

17 MR. SCARBOROUGH: Objection to form.

18 THE WITNESS: No.

19 BY MR. MICHAELSON

20 Q What -- what does that clause refer to,
21 then?

22 A So, again, recognizing that I'm, in my

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1 A Okay. I see paragraph 59.

2 Q You write that so far as you've been
3 able to discern, none of the above was
4 controversial. I'll just refer you to the last
5 sentence of paragraph 59.

6 You write, "I have found no evidence
7 that during the period from 1980 to approximately
8 2015, was the Federal Reserve asserting the power
9 to decide whether to grant priced services to
10 legally eligible depository institutions."

11 Do you see that?

12 A I do.

13 Q Did you look for evidence of this?

14 A I did.

15 Q What did you do?

16 A I looked through every annual report of
17 the Fed's Board of Governors. I looked at the
18 annual reports of many of the 12 Federal Reserve
19 Banks. I looked through official publications of
20 the Federal Reserve that mentioned the Monetary
21 Control Act, Federal Reserve accounts and the
22 after 1998 master accounts.

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1 I looked through the news sources from
2 over 140 databases available through ProQuest for
3 every reference to the Monetary Control Act that
4 I could find in historical newspapers and the
5 other things described in my report.

6 Q Did you do all that yourself?

7 A I did with the assistance of the
8 lawyers representing Custodia Bank who responded
9 to some of my research inquiries as I've made
10 them.

11 Q So I want to be careful not to invade a
12 privilege here, but I think to the extent you
13 instructed the lawyers to do something, I'm
14 entitled to ask.

15 What did you instruct the lawyers to do
16 to assist you in that work?

17 A I would make requests, but I'm going to
18 defer to them on privilege.

19 It's okay to answer?

20 MR. SCARBOROUGH: That's fine.

21 THE WITNESS: I would make requests to
22 the attorneys at Williams & Connolly to help me

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1 identify the comprehensive bodies of documents
2 relevant, both historically and public documents,
3 and then also, as relevant, anything produced in
4 discovery in this litigation.

5 The ProQuest searches I performed
6 myself. The investigations of the annual
7 reports, I performed myself.

8 I did use one of my research
9 assistants, though I did not discuss either that
10 this was relevant to an expert report nor the
11 expert report itself with my research assistant,
12 who helped me look through the annual reports of
13 the Federal Reserve.

14 BY MR. MICHAELSON

15 Q And what comprehensive research did you
16 ask Williams & Connolly to do?

17 A I asked them to give me every hearing
18 and public statement from every committee and
19 member of Congress that had been issued in and
20 around the passage of the Monetary Control Act,
21 not including its predecessor bills in the late
22 1970s.

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1 I asked for information regarding the
2 flow of information in this litigation between
3 the Federal Reserve Bank of Kansas City and the
4 Board of Governors of the Federal Reserve System
5 with respect to the decision on Custodia, and
6 then, as other related inquiries, when I would
7 find a subsidiary question on which my opinion
8 were necessary to ensure that I had the relevant
9 documentary evidence in support to reach a
10 conclusion in that regard.

11 Q Did -- did you ask them to look for
12 instances of the Federal Reserve asserting
13 discretion over access to services from 1980 to
14 2015?

15 A Yes.

16 Q And what did they find?

17 A They, like I -- we operated in parallel
18 on that -- on that question -- did not find those
19 assertions of discretion for access to services.

20 Q And are you -- do you include there the
21 Federal Reserve's assertion of power to terminate
22 access to services?

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1 a particular service between 1980 and 2015?

2 A For solvent institutions --

3 Q For solvent institutions.

4 A -- that did not fail? Again, the
5 instance of the -- the hijacked Central Bank of
6 Bangladesh instance, which would have been a
7 master account holder with a transaction that was
8 blocked, so that would be an example. That may
9 have been after 2015, though. I can't -- I can't
10 recall.

11 Q And how about not an actual assertion
12 of this power, but a -- but a claim to this
13 power? And that I mean the power to terminate
14 access to a service for a solvent institution.

15 A I have not seen that claim, and I did
16 not see that claim until 2015, in the instance of
17 the Fourth Corner Credit Union.

18 MR. MICHAELSON: Okay. Let's look
19 at -- we'll just do one more document before we
20 break here. Mark this as Exhibit 301, I guess.

21 (Deposition Exhibit Number 301 was
22 marked for identification.)

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1 BY MR. MICHAELSON

2 Q So I put in front of you a document
3 marked Exhibit 301, which is a document from the
4 Federal Reserve Bank of Dallas, and it attaches,
5 beginning the fourth page, a publication from the
6 Federal Register.

7 Do you see that?

8 A I do see that.

9 Q And this is Federal Register, Volume
10 50, No. 99, page 21120, titled "Policy Statement
11 Regarding Risks on Large Dollar Wire Transfer
12 Systems."

13 Do you see that?

14 A I do.

15 Q This is a policy that is set with an
16 effective date in 1986.

17 Do you see that?

18 A I do.

19 Q Okay. And, actually, the Fed Register
20 notice is at the top of the page. It's May 22nd,
21 1985. Do you see this? Do you see that?

22 A Where are you --

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1 Q Just at the top of the page.

2 A Oh, yeah. I see it. Yeah.

3 Q Okay. Is -- earlier you referred to a
4 policy statement from around this time period
5 regarding money transfers.

6 Is this the policy that you were
7 referring to?

8 A It is.

9 Q Okay. So you're familiar with this
10 policy?

11 A I am.

12 Q You've seen it before?

13 A I have.

14 Q And it's -- and it's public?

15 A It is.

16 Q What -- what is daylight -- what are
17 daylight overdrafts?

18 A I'm not exactly sure of the precise
19 definition. My general sense is that an
20 overdraft that occurs in the same day with
21 additional transactions being ordered on that
22 same account during that same day, but I'm not

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1 certain that that's true.

2 Q Okay. I'll refer you to page 21123.
3 In the bottom -- bottom right-hand corner, this
4 provides, "The Board is still concerned with
5 these overdrafts, and believes that it is
6 appropriate to take effective steps to control
7 risks to the Federal Reserve Banks by placing
8 more effective limits on Fedwire daylight
9 overdrafts."

10 Do you see that?

11 A I do.

12 Q Okay. And do you agree that -- that
13 this -- this policy is -- was public at the time?

14 A Yes.

15 Q And it reflects an assertion of Federal
16 Reserve authority to impose conditions and
17 restrictions on access to priced services?

18 MR. SCARBOROUGH: Objection to form.

19 THE WITNESS: Again, I would say that I
20 see the word "conditions" and "regulations" as
21 performing very different purposes for the Fed's
22 assertions of authority. I hear this as creating

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1 intend for the Federal Reserve to usurp the
2 determination from other supervisory authorities
3 that had been given that authority in other
4 statutes.

5 BY MR. MICHAELSON

6 Q But as you've said, Congress -- it was
7 not Congress's intent to eliminate entirely the
8 Federal Reserve System to -- the Federal
9 Reserve's power to conduct risk assessments of
10 institutions with master accounts, correct?

11 A Can you point to me when -- to when I
12 said that sentence? I don't -- I don't believe I
13 said it that way.

14 The way I would say it is that Congress
15 did not prevent -- again, without getting to the
16 legal determination, the framers of the MCA did
17 not engage substantially with the question of the
18 Fed's risk assessments around its priced
19 services. And, again, I can't recall any
20 instances of that discussion.

21 Q And at least we've seen here in Exhibit
22 301 that as of 1985, the Federal Reserve was

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1 claiming the power to conduct such risk
2 assessments, correct?

3 MR. SCARBOROUGH: Objection.

4 THE WITNESS: The -- I read Exhibit 301
5 to contain a regulation regarding what the Fed
6 shall do in the event of daylight overdrafts and
7 what to do to manage the question of daylight
8 overdrafts.

9 BY MR. MICHAELSON

10 Q Okay. And to prohibit the use of
11 Fedwire where an institution's use of Fedwire
12 would prevent risk to the Reserve Bank?

13 MR. SCARBOROUGH: Objection.

14 THE WITNESS: Again, just reading from
15 it, I would say that the 1985 policy statement
16 has a regulation that asserts the Reserve Bank's
17 right to protect its risk exposure from those --
18 those banks.

19 BY MR. MICHAELSON

20 Q Okay. I'm handing you a document
21 marked Exhibit 302, which is Operating Circular 1
22 from 1998.

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1 Are you familiar with OC1?

2 A I am.

3 Q And have you seen -- this is from 1998.

4 Have you seen this version before?

5 A I have.

6 Q And this was public, right?

7 A It -- it is.

8 Q Okay. I'd direct your attention to

9 Section 1.1, called "Scope."

10 Third paragraph, it says, "Your master
11 account is subject to Federal Reserve policies
12 such as those on payment system risk, reserve
13 balances and clearing balances as they may be
14 revised from time to time."

15 Do you see that?

16 A I do.

17 Q And this is a reference to policies
18 like the statement on large dollar wire transfers
19 that we were just looking at?

20 A That's right.

21 Q Okay. So this -- this is also another
22 example of the Federal Reserve asserting the

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1 power to -- asserting the power to decide whether
2 to grant use of priced service, correct?

3 MR. SCARBOROUGH: Objection.

4 THE WITNESS: No.

5 BY MR. MICHAELSON

6 Q Well, it's -- it's -- it's saying that
7 your master account is subject to the policy that
8 we were just looking at, right?

9 A That's right.

10 Q And in that policy, the Federal Reserve
11 asserted the authority to conduct risk
12 assessments to protect -- for the purpose of
13 protecting Reserve Banks from risk presented by
14 individual institutions, right?

15 MR. SCARBOROUGH: Objection.

16 THE WITNESS: That's right.

17 BY MR. MICHAELSON

18 Q Okay. And where risk was presented,
19 the Federal Reserve was claiming the authority to
20 cut off use of Fedwire to mitigate risk, correct?

21 MR. SCARBOROUGH: Objection.

22 THE WITNESS: Again, we have a

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1 different view on -- on the question of what
2 constitutes cutoff. And why I said no to my --
3 in my answer to your first question was because
4 you used the word "grant," which I took to be a
5 verb indicating access.

6 I don't read the 1985 policy statement
7 and don't see in the '98 Operating Circular 1 the
8 assertion that the Fed could reimpose discretion
9 as it has with Fed membership status on access to
10 accounts before 1998 and the master account
11 thereafter.

12 BY MR. MICHAELSON

13 Q Okay. I'll refer you to Section 2.3,
14 entitled "Establishing a Account," and the last
15 sentence of the first paragraph is "All master
16 accounts are subject to Reserve Bank approval."

17 Do you see that?

18 A I do.

19 Q So as of 1998, the Federal Reserve was
20 taking the position that master accounts are
21 subject to approval by a Reserve Bank?

22 A That's right.

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1 Q And in Section 2.8 on the following
2 page, on the right-hand side of the page, middle
3 of top paragraph there, there's a sentence that
4 reads, "We may close your master account or
5 terminate our approval of a pass-through
6 relationship at any time."

7 Do you see that?

8 A I do see that.

9 Q So as of 1998, the Federal Reserve was
10 asserting the power to close an institution's
11 master account at any time?

12 A That's right.

13 MR. MICHAELSON: All right. Let's mark
14 this.

15 (Deposition Exhibit Number 303 was
16 marked for identification.)

17 BY MR. MICHAELSON

18 Q I've put in front of you a document
19 marked 303. It's an exhibit marked 303. It's
20 federal -- from the Federal Register, entitled
21 "Policy on Payments System Risk," Federal
22 Register, Volume 69, No. 230, 69926. This is

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1 dated December 1, 2004.

2 Do you see that?

3 A I do.

4 Q Are you familiar with this policy on
5 payment system risk from 2004?

6 A Generally speaking, yes. I haven't
7 examined it thoroughly.

8 Q When's the last time you reviewed it?

9 A I glanced at it yesterday. Before
10 that, it had been -- it had been several months.

11 Q Okay. Direct your attention to the
12 page 69929. On the far left -- left column,
13 first full paragraph, it says, "Part II of this
14 policy governs the provision of intraday or
15 daylight credit in accounts of the Reserve
16 Banks."

17 Do you see that?

18 A I do.

19 Q And it says that it "sets out the
20 general methods used by the Reserve Banks to
21 control their intraday credit exposures."

22 Do you see that?

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1 A I do.

2 Q Do you agree that as of 2004, Reserve
3 Banks were applying methods to control their
4 intraday credit exposures?

5 A I am not familiar with what the Federal
6 Reserve Banks were doing in terms of their risk
7 exposure assessments for account holders. I'm
8 familiar only with the policy statement from 2004
9 describing -- describing it. So I'm familiar
10 with the policy statement, but not the --

11 Q Not the actual --

12 A -- practice itself.

13 Q -- practice. But you have no reason to
14 dispute that Reserve Banks were, in fact,
15 undertaking methods to control their intraday
16 credit exposures, correct?

17 A No reason to -- I have no reason to
18 dispute it, but I -- again, I don't -- I haven't
19 evaluated what those methods are.

20 Q Okay. Do you know if those methods
21 included assessments of whether individual
22 institutions presented risk to the Reserve Bank?

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1 Q Okay. And continuing on in Section II,
2 flip forward a couple pages to 69935. There's a
3 Section C on net debit caps.

4 Are you familiar with a net debit cap?

5 A I am not.

6 Q Do you know what a net debit cap is?

7 A I do not.

8 Q All right. The last -- in the
9 paragraph underneath "Net Debit Caps," the last
10 sentence, it says, An institution must be
11 financially healthy --

12 A I don't see where you are. I'm sorry.

13 Q Oh, so underneath "Net Debit Caps," No.
14 1 is Definition."

15 A Yeah.

16 Q Okay. The last sentence of the first
17 paragraph there.

18 A Yes, I see.

19 Q "An institution must be financially
20 healthy and have regular access to the discount
21 window in order to adopt a net debit cap greater
22 than zero to qualify for the filing exemption."

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1 Do you know what this refers to?

2 A I know in general terms what
3 constitutes regular access to the discount
4 window. I have a general sense of what a net
5 debit cap is, but I don't know what the
6 qualification for a filing exemption is.

7 Q Okay. Go ahead to 69937. The upper
8 left corner, the last sentence of the -- of the
9 paragraph in the upper left corner, it says, "For
10 example, if the institution's level of daylight
11 overdrafts constitutes an unsafe or unsound
12 banking practice, the Reserve Bank would likely
13 assign the institution a zero net debit cap and
14 impose additional risk controls."

15 Do you see that?

16 A I do.

17 Q Would you agree that this reflects the
18 Federal Reserve's assertion of power over use
19 of -- no, strike that.

20 Would you agree that this reflects, as
21 of 2004, the Federal Reserve's assertion of power
22 over the use of priced service?

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1 A Over its use, yes.

2 Q Okay. Including the power to impose
3 risk controls to mitigate risk to the Reserve
4 Bank?

5 A If we're defining zero in the net debit
6 cap and as a risk control, which the policy
7 statement seems to do, then yes.

8 Q Okay. Are you familiar with OC3,
9 Operating Circular 3?

10 A Not by its name.

11 Q But do you have a general understanding
12 of what OC3 relates to?

13 A No. I would need to review it.

14 Q When's the last time that you reviewed
15 OC3?

16 A If you could -- if I could see it, I
17 could tell you. I don't know what OC3 -- I mean,
18 I know it's an operating circular, but I would
19 need to see it before I could answer the
20 question.

21 Q Okay. How about OC4? Do you know what
22 OC4 is?

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1 A Again, not by its name.

2 Q Sitting here today, you don't know what
3 OC4 relates to?

4 A That's right.

5 Q Okay. And how about OC5? Are you
6 familiar with OC5?

7 A No.

8 Q Okay. So referring back to your --
9 referring back to your paragraph 59 here, you say
10 you found no evidence --

11 A Can you give me a second to --

12 Q Yeah, sure.

13 A -- go back?

14 Q It's Exhibit 299, your report, at page
15 25, paragraph 59.

16 A Okay. Paragraph what?

17 MS. CARLETTA: Page 25, paragraph 59.

18 THE WITNESS: Got it.

19 BY MR. MICHAELSON

20 Q So you're opining here that you found
21 no evidence of the Federal Reserve asserting
22 power to decide whether to grant priced services

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1 Q Okay. Did you ever look for a draft?

2 A I have looked at Julie Hill's SSRN page
3 before, but when -- in reading her -- her work,
4 as is standard practice for me, generally, as I
5 looked for published articles and used -- and
6 relied on those when they exist, and in this
7 instance, when I looked for the work, including
8 the work that I cited, I looked for the published
9 version.

10 Q I see. Have you ever discussed with --
11 with Julie Hill the extent to which the Federal
12 Reserve has asserted authority to limit access to
13 priced services?

14 A Yes, I have.

15 Q And did she ever express the view to
16 you that both the Board and the Reserve Banks
17 have long emphasized their discretion to limit
18 access to priced services?

19 A Not in exactly those terms. She did --
20 in 2018, I wrote an article for the Brookings
21 Institution where I came to the conclusion that
22 the Fed -- that the Fed's assertions here were

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1 inconsistent with the framers' intent of the MCA.

2 I believe but have not verified that
3 she responded to this on Twitter and that we had
4 a back and forth where she thought that my
5 conclusion was not correct.

6 Q Okay.

7 A And, again, that was in 2018.

8 Q Okay. So in formulating your opinion
9 in this case, did you rely on any of the Federal
10 Reserve Bank of Kansas City's internal policies
11 and procedures concerning master account access?

12 A Only as identified in my report itself.

13 Q Do you understand that the Federal
14 Reserve Bank of Kansas City has a credit and risk
15 management department?

16 A I do understand that.

17 Q Okay. And that -- that department is
18 separate from divisions within the Federal
19 Reserve Bank of Kansas City that handle
20 supervision?

21 A I'm not aware of what the relationship
22 is between them. I doubt very much that there

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1 is, in fact, a separation between them.

2 Q You doubt that?

3 A Yeah, I do --

4 Q And why --

5 A -- doubt that.

6 Q Why would you doubt that?

7 A My experience and understanding of the
8 way that the Federal Reserve Bank organizations
9 are that there's a lot of collaboration between
10 and among the divisions for all kinds of
11 purposes.

12 Q Okay. Do you have an understanding as
13 to whether the Federal Reserve Bank of Kansas
14 City has a credit risk management department
15 that's responsible for handling master account
16 requests?

17 A I'm not familiar with the way that
18 their organizational system is set up. I assume
19 and, in fact, recall relying upon documents that
20 suggested that their legal department, their
21 supervisory department, the president herself,
22 and others responded to master account requests.

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1 Q Okay. And sitting here today, do you
2 know whether the Federal Reserve Bank of Kansas
3 City has policies and procedures concerning the
4 handling of master account requests?

5 A Following the promulgation of
6 guidelines by the Board of Governors in 2022
7 commanding the Reserve Banks to formulate such
8 policies, I assume that those have been
9 formulating thereafter. I don't know what
10 policies existed prior to 2022.

11 Q Okay. So in preparing your report, you
12 didn't rely on any policies that the Federal
13 Reserve Bank of Kansas City had in place
14 concerning master accounts prior to 2022?

15 A If I did, I would have identified them
16 in my report, and if they are identified in my
17 report, then I did. If I did not, then I did
18 not.

19 Q But sitting here today, you don't
20 recall relying on them in any way?

21 A I did rely on a lot of different
22 documents that were produced as part of the

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1 discovery in this litigation and made a careful
2 accounting of those documents in the report
3 itself.

4 Q Did you ask Williams & Connolly to
5 provide you with policies and procedures that the
6 Federal Reserve Bank of Kansas City applies to
7 master account requests?

8 A When asking the Williams & Connolly
9 research staff for documents, I did ask for
10 documents relating to the granting of master
11 accounts.

12 I don't believe that I asked for them
13 by the name that -- using the terms that you just
14 used.

15 MR. SCARBOROUGH: Actually, we don't
16 need a sticker on that.

17 MR. MICHAELSON: Oh, sorry.

18 BY MR. MICHAELSON

■ ■ [REDACTED]

■ [REDACTED] ■

■ [REDACTED] ■

■ [REDACTED]

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Response	Percentage
Yes	75%
No	25%

114

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[illegible]

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1 Q That's all right. We'll cover that --
2 we'll cover that later.

3 Yeah, I want to focus on 2015. Is
4 there -- did something come out in 2015 that
5 speaks to this?

6 A The Fed asserted in its litigation with
7 Fourth Corner Credit Union various assessments
8 and categories of relevance in determining
9 access, and that's the -- that's what I refer
10 to as --

11 Q Okay.

12 A -- 2015.

13 Q And as far -- sitting here today, right
14 now, that's -- you think that's the first time
15 that the Federal Reserve publicly asserted that
16 it would perform risk rating of entities with
17 master accounts?

18 A No, no, not at all. So the risk
19 ratings -- as I mentioned earlier, risk ratings
20 are supervisory categories, and so the Federal
21 Reserve would make these kinds of risk
22 determinations for the supervised entities with

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1 master accounts that are under its supervisory
2 bailiwick, so Fed member banks, BHCs, financial
3 holding companies, Edge Act corporations, things
4 like that.

5 We've reviewed together the policy
6 statements that refer to risk assessments with
7 respect to ongoing use of -- of priced services,
8 but I have not reviewed an internal manual or a
9 publicly-available manual that refers to specific
10 risk assessments for the opening or maintenance
11 of master accounts prior to 2015.

12 Q Okay. Is -- let's -- let's break this
13 down. Is it your understanding sitting here
14 today that -- that Reserve Banks will assign risk
15 ratings to state-chartered nonmember banks that
16 have master accounts?

17 A I don't have that understanding. It
18 may well be the case. My understanding would be
19 what I read here just today in this 2019 manual
20 and the 2022 guidelines and the 2023 handbook,
21 the latter two written by the Board of Governors
22 to instruct the Reserve Banks on how to -- on how

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1 to make these decisions.

2 Now, those -- those documents do
3 include reference to risk assessments, some
4 expansive references to risk assessments. What
5 the Reserve Banks do, in fact, relative to those
6 policy statements, I cannot say based on this
7 information in front of me or otherwise.

8 Q Okay. Do you have a basis to opine
9 whether, let's say, in 2014, Reserve Banks were
10 conducting individualized risk assessments of
11 state-chartered nonmember banks with master
12 accounts?

13 A Whether they were doing so publicly?

14 Q Internally.

15 A So I do have an opinion about whether
16 they were doing so publicly. They were not, in
17 my opinion, based on the documents I have
18 reviewed.

19 I did not review internal confidential
20 documents that preceded or that were outside of
21 discovery in this case. So that would have
22 preceded 2015.

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1 Q Okay. So it's your opinion that
2 there's nothing -- you found nothing in the
3 public record suggesting that Reserve Banks
4 perform individualized risk assessments of
5 state-chartered nonmember banks with master
6 accounts in 2014?

7 A These caveats are extremely important
8 because --

9 Q Yes.

10 A -- again, I want to be very specific
11 and -- and particular in the opinions I'm
12 offering.

13 I have found policy statements to the
14 effect that risk assessments could be or even
15 should be performed. I have not seen those risk
16 assessments. In the same way that I make all
17 kinds of New Year's resolutions, whether or not
18 they happen or not are two different questions.
19 I've seen the policy vision laid out in the
20 policy statements, including the ones that we
21 have reviewed. I have not seen the
22 particularized risk assessments.

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1 Without seeing those particularized
2 risk assessments, I have -- I cannot say I've
3 seen evidence that they occurred. I don't take
4 the policy statement that they could or should
5 occur to be evidence that they did occur.

6 Q So I want to -- so at the end of the
7 day, are you -- are you saying you don't have a
8 basis to opine on whether risk -- individualized
9 risk assessments of any of these were actually
10 happening? Is that -- is that what I hear you
11 saying?

12 A That's right.

13 Q Okay. So you're not -- you're not
14 opining either way? You don't know if they were
15 happening or not?

16 A That's right.

17 Q Okay. But you have reviewed the
18 account access guidelines that were finalized in
19 2022 --

20 A That's right.

21 Q -- correct?

22 Those were issued by the Board of

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1 Governors, correct?

2 A That's right.

3 Q You're familiar with those?

4 A I am.

5 Q And you understand that they outline a
6 number of principles for Reserve Banks to apply
7 when considering account access requests?

8 A I'd love to review them before I can
9 answer on the specifics of the language you used
10 in characterizing them, if that's possible.

11 Q Sure. All right. This is a document
12 previously marked as Exhibit 34, which is the S
13 letter, and the account access guidelines are
14 attached.

15 So if you'd like to refresh on the
16 account access guidelines, they commence on the
17 page stamped AR18.

18 A I see that.

19 Q And for the moment, I want to just
20 focus on the six principles. So on page 35 of
21 the document that's Bates stamped AR52, we come
22 to the first principle.

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1 A I see AR52 and I see No. 1, but I'm
2 looking to see it identified as the first
3 principle. Sorry.

4 Q Yeah, sure. Go ahead.

5 A Okay. I'm there.

6 Q Okay. This is the first of the six
7 principles?

8 A That's right.

9 Q And you would agree that even before
10 the issuance of these guidelines, Reserve Banks
11 were considering an institution's eligibility
12 prior to granting master account requests,
13 correct?

14 A Again, I didn't see in the public
15 record the individual considerations of
16 eligibility that the Reserve Banks were doing.

17 I saw reference in Operating Circular 1
18 to the -- the question of eligibility, but I
19 didn't evaluate Reserve Banks' assessments of
20 eligibility in specific instances.

21 Q To your knowledge, was the Federal
22 Reserve Bank of Kansas City considering an

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1 institution's eligibility prior to granting it a
2 master account prior to the issuance of these
3 guidelines?

4 A I -- to my knowledge, I don't have an
5 opinion one way or the other.

6 Q Okay. How about the second principle,
7 which can be found on the next page, page 36?

8 This principle concerns an assessment
9 of credit, operational settlement, cyber or other
10 risks to the Reserve Bank. Do you see that?

11 A I do.

12 Q To your knowledge, was the Federal
13 Reserve Bank of Kansas City considering risks to
14 the Reserve Bank in connection with institutions'
15 master account requests prior to the issuance of
16 these guidelines?

17 A Because I have not been able to review
18 the specific considerations and specific
19 instances, I can't tell you what the Federal
20 Reserve Bank of Kansas City did or did not do in
21 reviewing requests to access a master account.

22 Q Okay. I guess my -- my sort of

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1 fundamental question is: Is this -- is this
2 consideration -- are you expressing opinion on
3 whether this changed -- the issuance of these --
4 this guideline changed a practice?

5 MR. SCARBOROUGH: Objection to form.

6 THE WITNESS: I am offering an opinion
7 on whether it changed the policy and that it did.

8 On whether it changed practice, because
9 I have not been able to assess exactly how the
10 Federal Reserve Bank of Kansas City or other
11 Federal Reserve Banks individually assessed or
12 did not assess the different requests to access a
13 master account, I can't say whether practice
14 changed as a result of the 2022 guidelines.

15 BY MR. MICHAELSON

16 Q I see. In other words, it may be
17 that -- that the Federal Reserve Bank of Kansas
18 City in practice was acting in a manner
19 consistent with the policy that was later
20 announced when -- in connection with the issuance
21 of these guidelines?

22 A It's possible that it was. It's

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1 possible that it wasn't. It's possible that it
2 still isn't. In my work on the history of the
3 Federal Reserve System going back to 1913, I
4 found copious examples of one or another Reserve
5 Banks zigging or zagging in conjunction with the
6 Board on -- on these -- on these policies until
7 the Board's instructions to subordinate with
8 respect to -- to policy occurs.

9 Q Are you expressing an opinion in this
10 case that the consideration of this principle,
11 No. 2, in connection with a request for account
12 access, is improper?

13 A I'm not making legal determinations
14 about propriety, if that's what you mean. I
15 don't offer an opinion on legal conclusions.

16 Q Is it inconsistent with law for the
17 Federal Reserve to consider risk to a Reserve
18 Bank in connection with granting a master
19 account?

20 A I offer --

21 MR. SCARBOROUGH: Objection.

22 THE WITNESS: I offer no opinion about

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1 consistency or inconsistency with law of any of
2 the litigants' practices.

3 BY MR. MICHAELSON

4 Q Okay. But you're offering an opinion
5 about congressional intent, correct?

6 A That's right.

7 Q And you're offering an opinion about
8 the Federal Reserve's historical practice, right?

9 A That's right.

10 Q Okay. So let's go through those two.

11 Is it your opinion that consideration
12 of risk to the Reserve Bank in connection with a
13 master account request is inconsistent with
14 congressional intent behind the Monetary Control
15 Act?

16 A I think that to the extent that risk to
17 the Reserve Bank constitutes a de facto
18 supervisory assessment that is usurped from state
19 supervisory authorities, then, yes, it is
20 inconsistent with the intent of the framers of
21 the MCA. And there are instances, including in
22 the ones that I reference in my expert report,

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1 has issued countless banking -- pieces of banking
2 legislation, each with -- especially after 1935
3 and the permanent institution of the FDIC, with a
4 specific lane of movement for the FDIC, OCC,
5 Federal Reserve, and state banking authorities,
6 and so the MCA comes from that legal context.

7 That legal context means that the very
8 kinds of assessments that we're talking about
9 here are a supervisory context for the
10 specifically designated supervisor to respond to.
11 In some cases, that would be the Fed, in some
12 cases, the OCC, in others, the FDIC, and in
13 others, the state banking authorities.

14 But for the Federal Reserve to then say
15 that it has the authority or the -- or it would
16 adopt the practice of usurping these other
17 entities within a financial system is something
18 that I am not aware of anyone around the passage
19 of the MCA even contemplating, including at the
20 Federal Reserve, because it had never been done
21 in that way before.

22 Q If every bank is unique then isn't it

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1 necessary for Reserve Banks to undertake an
2 individualized risk assessment of each
3 institution to assess the risk presented by that
4 institution to the Reserve Bank?

5 A Most emphatically, no. What it should
6 do is defer to those exact determinations by the
7 appropriately situated authority to -- that has
8 been put in place to assess precisely that risk
9 profile. And, again, that might be the Fed if
10 we're talking about member banks, bank holding
11 companies, financial holding companies, et
12 cetera, but it might be the OCC, and it might be
13 the FDIC, and it might be a state banking
14 authority.

15 Q So for Custodia that would be the
16 Wyoming Division of Banking?

17 A That's right.

18 Q And so it's your opinion that the
19 Federal Reserve Bank of Kansas City has to defer
20 to Wyoming Division of Banking's assessment of
21 the risk that Custodia presents to the Federal
22 Reserve Bank of Kansas City?

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1 A That's right. That deference is the
2 beating heart of the dual banking system.

3 Q Okay. And it's your opinion that
4 Congress intended through the Monetary Control
5 Act to empower states to be state-chartered --
6 states to be the gatekeepers of access to Federal
7 Reserve services?

8 A Well, the Constitution does -- does
9 that even preceding the creation of the Federal
10 Reserve System by creating state banks.

11 The Federal Reserve System was created
12 institutionally on top of a system of
13 state-chartered banks and national-chartered
14 banks, and so the order of operations is
15 reversed. The states come first and then the
16 Federal Reserve.

17 Q So referring back to the guidelines,
18 principle 2, here the Board is saying that
19 Reserve Banks should -- connection with an
20 account access request should consider whether
21 the institution presents or creates risk to the
22 Reserve Bank.

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1 Do you see that?

2 A Which -- which subpoint? Sorry.

3 Q Principle -- Principle No. 2 on page
4 36.

5 A I see that. And is there a subpart
6 that you're reading or just --

7 Q No, just --

8 A -- the top? Yeah.

9 Q -- the -- just Principle No. 2.

10 A Yeah.

11 Q And it's your opinion that what
12 Congress intended with the Monetary Control Act
13 is that this consideration be handled by the
14 state banking authority?

15 A No. To be handled by the Federal
16 Reserve for member banks and for bank holding
17 companies and financial holding companies, for
18 the FDIC for state, nonmember banks that were
19 members of the deposit insurance corporation or
20 the system, for the Comptroller of the Currency
21 for national banks and for state banking
22 authorities for those few banks that were not

AFTERNOON SESSION

WHEREUPON,

was called for continued examination, and having been previously duly sworn, was examined and testified further as follows:

MR. MICHAELSON: I was going to ask.

This one's a factual one. I wanted to correct something. I misspoke about my knowledge of Julie Hill's candidacy.

THE WITNESS: It is true that a year

ago or so, she mentioned to me that she was a candidate to be a dean, but in -- after our conversation, I looked back at my e-mail, and on November 22nd, about a month after I filed my report, in a conversation that I didn't respond to, she told me that she was a finalist for the

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1 deanship at the University of Wyoming. So I did
2 hear that from her.

3 MR. MICHAELSON: Okay.

4 THE WITNESS: I just wanted to clarify
5 that.

6 EXAMINATION BY COUNSEL FOR DEFENDANTS
7 CONTINUED

8 BY MR. MICHAELSON

9 Q Okay. Did you discuss your report in
10 this case with her?

11 A No.

12 Q And did you discuss -- subsequent to
13 submitting your report in this case, did you
14 discuss with her her views on historical exercise
15 of discretion by the Federal Reserve over access
16 to services?

17 A No.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[illegible]

[illegible]

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1 framework in the way that you and I might.

2 Q So if an institution requests a master
3 account from a Reserve Bank -- well, strike that.

4 A Reserve Bank is exposed to risk
5 arising from the provision of services to an
6 entity with a master account, correct?

7 A That's right.

8 Q And is it your opinion that there are
9 restrictions on Reserve Banks' ability to manage
10 that risk?

11 A I don't offer legal opinions of what
12 the Fed can and cannot do. I can opine that the
13 intentions of the framers of the MCA intended to
14 remove the Federal Reserve from exercising risk
15 management or other discretionary practices to
16 turn access to services into a quasi-membership
17 status. And so, in that sense, what the Federal
18 Reserve has been instructed to do, at least by
19 the intentions of the MCA's framers, is to use
20 the risk assessments that had been performed by
21 either the sister regulatory and supervisory
22 organizations at the federal level or by the

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1 state authorities in our federal system of dual
2 banking.

3 Q When you say the framers of the MCA,
4 who -- who are you referring to?

5 A Members of Congress, other participants
6 who lobbied for its -- its passage, people like
7 Paul Volcker, William Proxmire, people like that.

8 Q Okay. And so you are expressing the
9 opinion that they intended to restrict Reserve
10 Banks' ability to manage the risk presented by
11 the grant of master accounts to -- to
12 institutions?

13 (Cell phone interruption.)

14 MR. SCARBOROUGH: Objection.

15 THE WITNESS: Are you objecting to
16 yourself? Okay.

17 MR. MICHAELSON: He was objecting to
18 me.

19 THE WITNESS: Yeah.

20 BY MR. MICHAELSON

21 Q It is -- it is your opinion that the --
22 that the intent behind the Monetary Control Act

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1 was to restrict Reserve Banks' ability to manage
2 the risk presented by master accounts?

3 MR. SCARBOROUGH: Objection.

4 THE WITNESS: No, not in those terms.
5 It's my testimony that the framers of the MCA
6 intended for the Federal Reserve to engage with
7 other government entities to engage in whatever
8 risk assessments it felt it needed to engage with
9 respect to depository institutions that it, prior
10 to 1980, might engage bilaterally with respect to
11 access to those services.

12 After 1980, the expectation by the
13 framers would be that the Federal Reserve engage
14 on those very questions, should they have them,
15 with other -- other government entities.

16 But here again, I'm not citing any
17 specific statement to that effect because this is
18 not a question that they were contemplating in
19 terms of the specific processes of risk
20 assessment or counterparty risk or -- or daylight
21 overdrafts or the like. I didn't see discussion
22 at that level of specificity, so my opinion is at

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1 a level of abstraction higher.

2 BY MR. MICHAELSON

3 Q Did the Monetary Control Act impose on
4 states any new obligations to assess risk
5 presented to Reserve Banks by the issuance of
6 master accounts and services?

7 A I'll leave the legal interpretation of
8 the MCA to the Court to determine, so I can't --
9 I don't have an opinion about what the MCA
10 imposed or did not impose.

11 Q You don't have an opinion on what the
12 MCA imposed or did not impose?

13 A I don't have an opinion about the legal
14 interpretation of the scope of the MCA in terms
15 of the authorities or restrictions that it
16 placed.

17 Q Okay. But you are opining on the
18 intent -- the legislative intent behind the
19 statute, right?

20 A (Nodding.)

21 Q And did --

22 MS. CARLETTA: Hold on. You have to

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1 answer verbally. Sorry.

2 THE WITNESS: Yes, that's right.

3 BY MR. MICHAELSON

4 Q And did the legislators who passed the
5 MCA intend to impose on states the obligation to
6 assess risk presented to Reserve Banks by the
7 issuance of master accounts to state-chartered
8 nonmember institutions?

9 A It's my opinion that that is the
10 implication of the framers' intention, although
11 they did not state that exact fact, so I'm not
12 quoting one of the MCA's framers to that effect.

13 What I -- the expert opinion that I
14 offer in terms of the legislative history of the
15 MCA is that the framers intended to remove the
16 Federal Reserve from its position, former
17 position, of engaging in precisely these kinds of
18 assessments and to leave those assessments to the
19 other relevant governmental agencies at the state
20 or federal level.

21 Q So you're saying that it was an
22 unintended consequence of the Monetary Control

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1 Act?

2 A No.

3 MR. SCARBOROUGH: Objection.

4 BY MR. MICHAELSON

5 Q You're saying it's just an unstated
6 implication of the Monetary Control Act?

7 MR. SCARBOROUGH: Objection.

8 THE WITNESS: I'm saying it's an
9 implication of their decision to remove the
10 Federal Reserve from engaging in threshold-level
11 evaluations about whether legally eligible
12 depository institutions can gain access to
13 Federal Reserve services.

14 BY MR. MICHAELSON

15 Q So did the framers of the MCA, in your
16 view, intend that result or not?

17 A They did intend that result.

18 Q They did?

19 A Yes.

20 Q While at the same time imposing no new
21 obligations on the states to consider risk to
22 Reserve Banks?

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1 A The obligations on the states that did
2 exist were defined primarily by state law, except
3 insofar as these state depository institutions
4 sought to gain membership either to the federal
5 deposit insurance system or to the Federal
6 Reserve system.

7 Q To your knowledge, is there any statute
8 that requires the Wyoming Division of Banking to
9 consider risks to the Reserve Bank of Kansas City
10 presented by state-chartered institutions subject
11 to its supervision?

12 A Not to my knowledge, no.

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

5 BY MR. MICHAELSON

6 Q My -- my question is: What did -- when
7 Congress passed the Monetary Control Act, did it
8 intend for Wyoming to take over the
9 responsibilities reflected in this exhibit?

10 A So a few parts in my answer to your
11 question. So the first is, I'm not aware that
12 these responsibilities existed in 1980 as they
13 are defined here, so I don't think that the
14 framers of the MCA had these specific
15 responsibilities in mind.

16 It is my testimony that the framers of
17 the MCA intended for the Federal Reserve to defer
18 to the supervisory assessments made by the
19 supervisors, which the Federal Reserve was not
20 for nonmember banks other than for holding
21 companies and -- and others identified by
22 statute.

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1 banking history, including the passage of various
2 statutes.

3 Q Are you expressing an opinion about
4 congressional intent on any statute other than
5 the Monetary Control Act?

6 A Not -- not as such, except in service
7 of the opinion that I offer about what the
8 framers of the MCA intended to do.

9 Q Are you expressing an opinion about
10 the -- are you familiar with Section 342 that
11 says Reserve Banks may accept deposits?

12 A Of the Federal Reserve Act, yeah.

13 Q Yes?

14 A Yes.

15 Q You're familiar with that?

16 A Yes.

17 Q Are you expressing an opinion on the
18 congressional intent behind that opinion?

19 A No.

20 Q Okay. And are you able to point to any
21 federal statute that authorizes Reserve Banks to
22 take actions to mitigate risk to that Reserve

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1 Bank presented by state-chartered nonmember banks
2 with master accounts?

3 A I don't offer opinions about what
4 statutes authorize or don't authorize, which I
5 would regard as a legal conclusion left to the
6 Court to decide.

7 MR. MICHAELSON: Let's mark this
8 document here.

9 (Deposition Exhibit Number 304 was
10 marked for identification.)

11 BY MR. MICHAELSON

12 Q I'm handing you a document marked 304,
13 Exhibit 304, which is entitled -- entitled
14 "Guidance for Federal Reserve Financial Services
15 Applicants That Are Deemed High Risk by the
16 Federal Reserve Bank of New York."

17 Do you see that?

18 A I do.

19 Q And I'll refer you to the end. At the
20 very end, you'll see that it's dated August 18,
21 2014. Do you see that?

22 A I do.

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1 Q I'll give you a moment to review it,
2 and my question is whether you've seen it before.

3 A May I ask, this is a public document?

4 Q It is a public document.

5 A It looks familiar to me, but I don't
6 know that I have -- if I have relied upon it for
7 my report. I don't think that I did, but it is
8 very possible that I have seen it before.

9 Q Okay. And it says in the second
10 paragraph that for each high-risk applicant for
11 Federal Reserve services, the Bank will conduct
12 enhanced due diligence and risk assessment, and
13 the Bank may take steps to mitigate risks posed
14 by the applicant.

15 Do you see that?

16 A I do.

17 Q Are you expressing an opinion on this
18 case on whether, in 2014, the Federal Reserve
19 Bank of New York had statutory authority to do
20 that?

21 A I don't express opinions about whether
22 the -- what statutory authority the Federal

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1 Reserve or any of its Reserve Banks does or does
2 not have.

3 Q Okay. But it is your opinion, though,
4 that this conduct by the Federal Reserve Bank of
5 New York would be inconsistent with the intent of
6 the drafters of the Monetary Control Act?

7 A Not necessarily. It depends entirely
8 on what is meant by the steps taken to mitigate
9 risk, risks posed by the applicant.

10 Q I see. So if those steps to mitigate
11 risk included restricting access to a service to
12 mitigate risk without entirely eliminating use of
13 the service, that could be consistent with the
14 Monetary Control Act?

15 MR. SCARBOROUGH: Objection to form.

16 THE WITNESS: It might be. I'd need to
17 know more about what -- the nature of the service
18 restrictions, the process through which that
19 conclusion was reached and what relationship the
20 Federal Reserve Bank had with the supervising
21 authority, supervising authority of the legally
22 eligible depository institution.

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1 conclusion.

2 As I read this document and I'm
3 asking -- and you're asking if it changes my
4 opinion about whether the Fed asserted a
5 discretion to block access to its master account
6 or Federal Reserve account to legally eligible
7 depository institutions, this document does not
8 change my opinion in that regard for those
9 reasons.

10 Q Well, I'm -- I mean, really, I'm
11 referring back to your own opinion, paragraph 86.

12 Here you opine that when the Fed issued
13 the account access guidelines in 2022, it
14 announces that it will be conducting a, quote,
15 searching evaluation --

16 A That's right.

17 Q -- in its attempt to execute the master
18 account agreement based on the Fed's own
19 assessment of risk.

20 And my question is whether you're
21 expressing an opinion that that is inconsistent
22 with the Fed's historical practice, and as I

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1 understand it, you are expressing that opinion.

2 You're saying this is inconsistent with
3 the Fed's historical practice, and you stand by
4 that; is that correct?

5 A If I can define what I would mean by
6 historic practice going back to 1980, I would
7 stand by that opinion. I would not stand by the
8 opinion that it is new in 2022, and, indeed, the
9 title of my heading here is that the Federal
10 Reserve doubles down on its claim of discretion,
11 which -- by which I mean that the Fed was not
12 announcing a new standard in 2022.

13 Q Right. Your -- your opinion is that it
14 changed in 2015 --

15 A That's right.

16 Q -- right?

17 A That's right.

18 Q Right. That in 2015, it started to
19 exercise its discretion.

20 And your -- your testimony is that
21 Exhibit 304, which is dated 2014, doesn't affect
22 your opinion?

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1 A It doesn't affect my opinion for simple
2 quantitative reasons. I don't know the exact
3 numbers of legally eligible depository
4 institutions in the United States in 2014, but
5 could speculate that it's in -- well above 10 and
6 probably closer to 15,000 in -- in 2014.

7 Of those, the number of institutions
8 that are not subject to the supervision of the
9 United States -- of a United States federal
10 banking regulator, Edge Act corporations and the
11 like, would have been tiny relative to those
12 numbers, and so the searching evaluation that
13 we're talking about would not have -- would not
14 have occurred.

15 Q And that opinion that you're just
16 expressing there isn't limited to the Reserve
17 Bank of New York's district, right? That would
18 have been true nationwide?

19 A That the -- that I think that it is
20 inconsistent with the intent of the framers of
21 the MCA that there be -- there would be a
22 searching evaluation to determine whether a

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1 legally eligible depository institution could
2 gain access to Federal Reserve services, you
3 mean?

4 Q No. I mean the -- as I understand what
5 you're saying is that there would have been --
6 prior to 2014, there would have been very few
7 banks requesting a master account from the
8 Federal Reserve of New York that were
9 state-chartered, nonmember banks that would have
10 been subjected to this enhanced due diligence.

11 Is that -- did I understand you
12 correctly?

13 A That's right. I don't think that's a
14 large number of depository institutions.

15 Q Right. And --

16 A Even so --

17 Q And that would -- then that would be
18 the same across all the districts?

19 A I assume so. I don't -- I don't know
20 the numbers, actually, and so I shouldn't -- I
21 shouldn't give a conclusive opinion on those
22 numbers.

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1 Q Okay. But is it -- but is it your
2 opinion that beginning in 2015 or around 2015,
3 there was an uptick in requests from
4 state-chartered, nonmember banks that presented
5 greater risk to the system?

6 A I don't offer that opinion. My opinion
7 would be consistent with the idea that the
8 Federal Reserve simply granted those access
9 requests without a searching evaluation prior to
10 2013, and would also be consistent if there were
11 an uptick, but I don't offer an opinion about the
12 quantities there.

13 Q Are you able to identify any
14 institutions that are state-chartered, nonmember
15 banks who are uninsured that requested and
16 received master accounts between 1980 and 2015?

17 A I am not aware, but I have -- I
18 wouldn't have access to that information because
19 it is not public.

20 Q Okay. And you'd agree that the Federal
21 Reserve didn't make public information till very
22 recently about what entities had or did not have

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1 master accounts?

2 A That's right. There was recent federal
3 legislation that required the disclosure, but
4 that was, again, very --

5 Q Right.

6 A -- recently.

7 Q And that -- that legislation just
8 passed in 2022; is that right?

9 A That's right.

10 Q And one of the reasons why that
11 legislation was passed was because of concerns
12 about the capacity of the Federal Reserve System
13 with respect to grant of master accounts, right?

14 A While I was familiar with and
15 participated in some of the debates regarding the
16 legislative process, I haven't acquainted myself
17 enough sufficiently to opine on the intents of
18 the -- intentions of the framers of the 2022 act.

19 Q You would agree that prior to the
20 passage of that legislation, the Federal Reserve
21 Bank didn't publicize when a master account was
22 denied?

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1 Federal Reserve Bank of Kansas City that denied
2 Fourth Corner's request for a master account?

3 MR. SCARBOROUGH: Objection.

4 THE WITNESS: My understanding was that
5 the Board of Governors had at least controlled
6 the decision, if not made the decision, to deny
7 the master account, although the decision was
8 formally issued from the Federal Reserve Bank of
9 Kansas City.

10 BY MR. MICHAELSON

11 Q Are you expressing an opinion in this
12 case that the Board controlled the decision to
13 deny Fourth Corner's master account request?

14 A I don't -- I don't offer that
15 conclusive opinion. I have not been able to
16 evaluate internal deliberations between the Board
17 of Governors and the Kansas City Fed.

18 Certainly, the things that I have read
19 from that litigation and the public disclosures
20 about Fourth Corner and the scholarship
21 surrounding these questions lead me to include
22 that the Board of Governors -- the Board of

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1 Governors controlled that decision-making and
2 policy decision.

3 Q In the next section of your expert
4 report, Section 4, you cover decisions that you
5 assert were made by the Board over master account
6 requests. You focus in particular on three, The
7 Narrow Bank, Territorial Bank of American Samoa
8 and Custodia, but you don't opine on Fourth
9 Corner?

10 A Can you tell me which parts you're
11 talking about here in my report, which
12 paragraphs?

13 Q You can refer to romanette i. The
14 table of contents might be easiest.

15 A Okay.

16 Q As I understand, in Section 4 of your
17 report is where you are opining on specific
18 decisions that were controlled by the Board of
19 Governors?

20 A That's correct.

21 Q And Fourth Corner's not there, right?

22 A No, I -- I believe we just read in

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1 paragraph 60 that -- and 61 references to Fourth
2 Corner.

3 Q Right. I know. I'm -- I'm focused
4 here on this distinction of whether it's the
5 Board of Governors that controlled the outcome of
6 Fourth Corner's request or the Reserve Bank of
7 Kansas City, and I'm trying to understand why
8 you're expressing an opinion in this case as to
9 who controlled that outcome.

10 A My -- the opinion that I expressed to
11 you now in testimony and, I think, consistent
12 with my expert report is that everything that I
13 reviewed about the -- from the litigation file
14 regarding Fourth Corner Credit Union was that the
15 Board of Governors controlled that policy
16 process, but I haven't had access to all internal
17 files for the Board of Governors or Federal
18 Reserve Bank of Kansas City with respect to
19 Fourth Corner to reach that decisive conclusion.
20 But what I have reviewed is consistent with that
21 conclusion, and that's the opinion that I offer.

22 Q So the -- I want to make sure I

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1 either in the briefing or in the scholarship that
2 talked more specifically about the Board of
3 Governors' participation in that decision.

4 BY MR. MICHAELSON

5 Q Okay. And sitting here today, what do
6 you recall about that?

7 A Only that the decision was guided by
8 the Board of Governors, that this was not an
9 independent decision of the Federal Reserve Bank
10 of Kansas City.

11 Q It's your recollection that the Board
12 of Governors guided the decision?

13 A It's my recollection that the decision
14 was not an independent decision of the Federal
15 Reserve Bank of Kansas City.

16 Q Well, those are two different things,
17 right?

18 A Yeah.

19 Q So what's your opinion?

20 A That the decision was not an
21 independent decision of the Federal Reserve Bank
22 of Kansas City and Fourth Corner.

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1 Q Okay. When you say it was not an
2 independent decision, is that consistent -- I
3 want to understand how you're using that term.

4 Is that consistent with the Reserve
5 Bank of Kansas City denying it in the exercise of
6 its own discretion after having consulted with
7 other parties like the Board?

8 MR. SCARBOROUGH: Objection to form.

9 THE WITNESS: My understanding --
10 again, and the expert report didn't include it in
11 that section, not because I don't have a view on
12 the Board's participation, but because the
13 materials I reviewed in writing my expert report
14 were more conclusive with respect to the
15 Territorial Bank of American Samoa and The Narrow
16 Bank than in Fourth Corner.

17 But still sticking with Fourth Corner,
18 my understanding and my review of the materials
19 as I sit here today is that the -- the Kansas
20 City Fed did more than consult with the Board in
21 reaching its own independent decision, that, in
22 fact, the Board had a view, and that view was to

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1 deny that -- that request and that the Federal
2 Reserve Bank of Kansas City followed the Board's
3 view in this regard.

4 BY MR. MICHAELSON

5 Q Okay. And sitting here today, you
6 think that's reflected in the litigation papers
7 in the Fourth Corner case?

8 A As I sit here today, it's reflected in
9 the materials I relied upon in my expert report,
10 which included those -- the litigation papers and
11 the press coverage and the scholarship about
12 master account access.

13 Q But you're not able to point -- like,
14 this isn't in your expert report, so I'm trying
15 to --

16 A Yeah. I totally --

17 Q I'm -- I'm --

18 A I hear you.

19 Q And so if you're expressing an opinion
20 in this case on this, I'd like to know your --
21 your basis, and so to say it's sort of in
22 everything you relied upon, that makes it

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1 a historian, I see innovations at various states,
2 including those that attract experimentation in
3 one state over another, consistent with great
4 practices and bad practices and practices in
5 between.

6 BY MR. MICHAELSON

7 Q Just a few more questions, and then we
8 can take -- take a break.

9 It's your opinion that the Board
10 dictated the outcome of TBAS's master account
11 request?

12 A Can you point to me where it said that
13 I dictated that outcome?

14 Q Paragraph 98 of your report, last
15 sentence.

16 A Yes, I wrote that.

17 "The Board dictated the outcome of
18 TNB's and TBAS's master account requests because
19 each of those cases raised public policy
20 questions."

21 That's right.

22 Q Okay. So that's -- that's your opinion

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1 in this case? The Board dictated those outcomes?

2 A That's right.

3 Q And do you have any direct knowledge as
4 to who at the Board dictated the outcome of TNB's
5 master account request?

6 A I do not.

7 Q Do you have any direct knowledge as to
8 who at the Board dictated the outcome of TBAS's
9 master account request?

10 A I do not.

11 Q When you use the phrase "dictated the
12 outcome" here, is that the same -- mean the same
13 thing as control the outcome?

14 A I do treat those as synonymous.

15 Q Okay. In this -- in this context?

16 A In this context.

17 Q All right. And what is your basis for
18 concluding that the Board dictated the outcome of
19 TBAS's request?

20 A I reviewed the -- because there was no
21 litigation in that case that I know of -- don't
22 know of -- at least there was no public

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1 litigation record that I could review. There
2 were some press accounts in the American Banker
3 by Rob Blackwell, which I reviewed, and then I
4 reviewed the scholarship on TBAS from Julie Hill.

5 And in reviewing those outcomes,
6 including the role of Randy Quarles, who is
7 the -- appointed by President Trump as the vice
8 chair for supervision at the Board of Governors
9 in 2017, led me to the conclusion that TBAS's
10 master account approval, which only occurred
11 after that fact, was -- was controlled by the
12 Board of Governors.

13 Q So you don't have direct -- direct
14 knowledge of board control. You're relying on
15 secondary sources like articles in the American
16 Banker and Julie Hill's article?

17 A Historians don't regard news articles
18 necessarily as secondary sources, although you
19 correctly characterized Julie Hill's scholarship
20 as a secondary source.

21 What I relied on in that sense -- I'm
22 not offering this opinion as a fact witness to

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1 say, here's what I know because of what I
2 observed. I offer that opinion as an expert on
3 the Federal Reserve structure, its history, and
4 based on the review of these materials.

5 It's also informed by my historical
6 understanding of the relationship between the
7 Federal Reserve Banks and the Board of Governors
8 that leads me to that conclusion.

9 Q If you look at Julie Hill's article,
10 page 491, the first full paragraph, she writes
11 that "TBAS learned the San Francisco Fed would
12 open TBAS's account."

13 Do you see that?

14 A I do.

15 Q So their account was opened with the --
16 with the San Francisco Fed, not the Board of
17 Governors, right?

18 A The Board of Governors doesn't have
19 accounts.

20 Q Right. So it would be the San
21 Francisco Fed that was exposed to any
22 counterparty risk presented by TBAS's activities?

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1 A No, the Federal Reserve --

2 MR. SCARBOROUGH: Objection.

3 THE WITNESS: The Federal Reserve
4 System is exposed to counterparty risk, which
5 comes in a variety of different categories,
6 including reputational risk, which would, in
7 fact, not just -- affect not only the San
8 Francisco Fed, but other Federal Reserve Banks
9 and the Federal Reserve System generally,
10 including the Board of Governors.

11 BY MR. MICHAELSON

12 Q Okay. And if you go to the next page,
13 492, at the top, she writes that "The San
14 Francisco Fed manages the risk posed by TBAS
15 remotely."

16 Do you see that?

17 A I do.

18 Q Do you agree that the San Francisco Fed
19 manages the risk imposed by TBAS?

20 A I don't have independent knowledge of
21 what the Federal Reserve Bank of San Francisco
22 does in terms of its relationship to TBAS and the

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1 request that were not provided to you prior to
2 your completing your expert report?

3 A I can't remember the last time I was
4 surprised, so I don't know that that's -- that's
5 something I can say.

6 I know that the documents that I asked
7 for -- the category of documents that I requested
8 from the research staff at Williams & Connolly
9 pertain to the flow of information between the
10 Reserve Bank and Board of Governors about the
11 ultimate denial of Custodia's request for access
12 to a master account.

13 When I received those documents and
14 reviewed them, I felt that they were sufficient
15 to add to my understanding based on my
16 exploration of the Fed's history about the
17 relationship of the Board of Governors to the
18 Reserve Banks with respect to policy
19 determinations like access or denial to master
20 accounts and used the documents that are received
21 from the research staff at Williams & Connolly to
22 inform that ultimate conclusion.

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1 So if there were other documents that
2 might be relevant, I can't say, and if you put
3 them in front of me now, I'd be glad to review
4 them, but I don't know that I would be surprised
5 by their existence or not.

6 Q Are you aware that Federal Reserve Bank
7 of Kansas City personnel conducted a risk
8 assessment of Custodia in the late 2021, early
9 2022 time period?

10 A I'm aware in the documents on which I
11 relied that were produced by the research staff
12 at Williams & Connolly that there were
13 discussions of risk regarding Custodia.

14 What that -- whether those discussions
15 and analyses together constituted a risk
16 assessment, I couldn't say. If there's a
17 document you have in mind, I'd be glad to review
18 it and then tell you if it was a document that I
19 reviewed that led to that conclusion.

20 Q My question is whether you're aware
21 that Kansas City personnel performed a risk
22 assessment in late 2021, early 2022.

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1 A And I'd want to -- before I accept your
2 characterization of what they said, I'd want to
3 say what the documents were that I relied on and
4 see if my characterization of their activity
5 would match yours before I could answer.

6 So if there's a specific document you
7 have in mind that reflected that risk assessment,
8 I'd be glad to look at it.

9 Q Are you aware sitting here today that
10 Federal Reserve Bank of Kansas City personal
11 conducted an examination of Custodia in around
12 September of 2022?

13 A I know that throughout that process
14 that the staff of the Federal Reserve Bank of
15 Kansas City and the staff of the Board of
16 Governors were in consultation with each other
17 and with Custodia regarding Custodia's request
18 initially for access to a master account and
19 subsequently for membership in the Federal
20 Reserve System.

21 I'd want to see the document you have
22 in mind that is the evidence of that examination

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1 before I could comment on it.

2 Q You understand that -- that Custodia's
3 application for membership to be a Federal
4 Reserve member is a different request than their
5 request for a master account, right?

6 A That has been at the heart of my
7 testimony from the very beginning. Membership is
8 very different from a request for access.
9 There's no dispute about that.

10 Q Different standards apply?

11 A Very different standards apply --

12 Q Okay.

13 A -- to the request for Fed membership
14 versus access to a master account by a legally
15 eligible depository institution.

16 Q Okay. And the -- the examination that
17 was conducted of Custodia in September of 2022,
18 sitting here today, what do you know about it?

19 A The reason I resist that
20 characterization and would prefer to look
21 together with you at a document is that
22 examination is a term of art in banking history.

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1 I'm very skeptical that an examination the way
2 that I understand the term occurred, and so I'd
3 want to know what it is that you're calling an
4 examination before I could comment on it.

5 I know that there were substantial and
6 lengthy conversations between Custodia and
7 staffers at the Federal Reserve Bank of Kansas
8 City and at the Board of Governors. Which of
9 these constituted in your view an examination, I
10 can't say. Which of these constituted in my view
11 an examination, I wouldn't be able to say until I
12 could see it.

13 Q And sitting here today, do you recall
14 that in the view of Kansas City personnel, they
15 conducted an examination in September of 2022?

16 A I -- I don't know what they viewed as
17 an examination. The --

18 Q Do you know whether they went on site?

19 A I seem to recall that there was a site
20 visit. I can't recall specifically. That's
21 my -- so I'll repeat my request for any documents
22 that you have that I relied on.

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1 from the fall of 2022 regarding back and forth
2 with the Kansas City Fed and -- and Custodia.

3 I recall also documents part of the
4 same --

5 Q What documents do you remember?

6 A I -- they were cited in my report. I
7 can read to you those --

8 Q What documents --

9 A -- segments.

10 Q -- do you remember today?

11 A I don't remember the specifics.

12 MR. SCARBOROUGH: Object to form. Go
13 ahead.

14 THE WITNESS: I don't remember the
15 specifics. It's -- it's been a couple of months,
16 but I did list every document that I consulted in
17 my report.

18 BY MR. MICHAELSON

19 Q Did you read every page of every
20 document cited in your report?

21 A I turned every page, reading some fast,
22 some slow. Some documents had -- I was more

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1 interested in the first pages and maybe did not
2 read the middle or last.

3 Q Do you recall whether Kansas City
4 personnel conveyed to Custodia in the fall of
5 2022 their conclusion that Custodia was -- their
6 policies and procedures were not what -- were not
7 what Kansas City would expect to see with respect
8 to functioning depository institutions?

9 MR. SCARBOROUGH: Objection.

10 THE WITNESS: May I see the document
11 that you're alluding to?

12 BY MR. MICHAELSON

13 Q I'm asking if you recall seeing one.

14 A But that -- I can't answer your
15 question if I recall a characterization of a
16 document, because what I would want to see in the
17 document itself is whether your characterization
18 matches the document.

19 I recall reading the documents. I
20 don't recall whether -- and, in fact, in many of
21 the questions you've asked me, your
22 characterization of the documents has not matched

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1 my reading of the document, and we've been able
2 to have a better conversation when we've been
3 able to look at the same document together.
4 That's what I'm worried about with being able to
5 answer your questions, because I doubt very much
6 that your characterization of the document would
7 match mine, even though I did review these
8 documents.

9 So you're asking if I reviewed the
10 documents. The answer is yes. If the answer is
11 that I agree with your characterization of them,
12 the answer is I don't know. If you're telling me
13 I can't review -- see the documents that you're
14 characterizing to me today, then I don't know how
15 I can help you with your questions.

16 Q Do you recall asking Williams &
17 Connolly to give you additional documents on any
18 particular subject?

19 A We had a lot of correspondence. I
20 corresponded with -- in making requests to the
21 research team, when they would give me some
22 responses, I would read through the documents and

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1 not feel like I had gotten a big enough picture
2 of what I was asking, and so I would ask repeated
3 efforts. We iterated several times.

4 Q And do you recall looking at Caitlin
5 Long's notes?

6 A Are these cited in my report?

7 Q Handwritten notes. Do you recall
8 looking at Caitlin Long's handwritten notes?

9 A I remember documents with handwritten
10 notes. I can't recall if they were Caitlin
11 Long's.

12 Q Do you understand that the Federal
13 Reserve Bank Kansas City personnel conducted what
14 they called a pre-membership exam of Custodia in
15 the fall of 2022?

16 A I can't recall the way that they
17 characterized their engagements with Custodia in
18 the fall of 2022 in terms of the specific
19 terminology.

20 Q Do you recall if the Kansas City
21 personnel formed conclusions about Custodia as a
22 result of what they called the pre-membership

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1 examination?

2 A I remember that there were several
3 conclusions, all of which I regarded as
4 preliminary, leading to the ultimate conclusion
5 from various staffers at the Kansas City Fed
6 about -- about Custodia.

7 Q What conclusions do you recall them
8 reaching?

9 A I recall Kansas City Fed personnel
10 discussing and expressing concerns about various
11 aspects of the policies that -- and systems that
12 Custodia had put in place, but more specific than
13 that, I'd invite you again to allow us to
14 collaborate together and see a document and
15 exhibit.

16 Q And -- and did you -- do you recall
17 seeing any documents in which Kansas City Fed
18 employees conveyed their conclusions as to
19 Custodia to supervisors within the Federal
20 Reserve Bank of Kansas City?

21 A I know that the -- the Department of
22 Credit within the Division of Supervision at the

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1 Kansas City Fed engaged with colleagues elsewhere
2 in the Division of Supervision, but I don't
3 recall something more specific than that. I'd
4 invite you again to --

5 Q Do you know who -- who runs Kansas
6 City's credit and risk management function?

7 A I don't recall the person's name, no.

8 Q And do you know who that person reports
9 to?

10 A I would assume that person -- because
11 the credit department is a department of the
12 Division of Supervision, I would assume that the
13 hierarchy is within the Division of Supervision,
14 but it may be different.

15 Q And who's that person?

16 A I don't recall the name of the person
17 who's in charge of Supervision.

18 Q Do you know who that person reports to?

19 A The Division of Supervision reports to
20 the president of the Kansas City Fed.

21 Q Referring to paragraph 110 in your
22 opinion, you write that Custodia's the, quote,

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1 first bank to combine traditional banking with
2 crypto-assets.

3 Do you see that?

4 A Yes.

5 Q Is that your opinion?

6 A It is not. That is a typo. It should
7 say as one of the first banks, not the first
8 bank.

9 Q Who -- what are the other banks?

10 A As I recall, there was a letter from
11 the Comptroller of the Currency to all national
12 banks -- the year I won't know off the top of my
13 head, but it would have been 2021 or '22 --
14 authorizing those banks, those national banks, to
15 provide some kinds of crypto-asset financial
16 services. Those banks then would have been the
17 first to combine traditional banking with
18 crypto-assets.

19 I believe that one of them is J.P.
20 Morgan Chase. I believe that another is Wells
21 Fargo. I'm not certain of this, but I do know
22 that several national banks accepted the

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1 Another is the use of blockchain,
2 another decentralized ledger technology, and the
3 management of back-office services for large
4 financial institutions, the likes of which have
5 already been --

6 Q Is Custodia going to do that?

7 A I haven't -- I don't offer an opinion
8 about Custodia's business model.

9 Q Well, I want to know what matters of
10 policy that the Board felt essential to assess
11 before deciding on Custodia's master account.

12 A My --

13 Q What were those?

14 A Yeah. My understanding is that they
15 implicated not specific claims about Custodia's
16 business model, but what a financial institution
17 like Custodia Bank having received a charter
18 through Wyoming might do, not just Custodia, but
19 for the precedent it might set for those
20 institutions like Custodia.

21 Q I see. So broader policy concerns, not
22 specific to Custodia's business model?

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1 MR. SCARBOROUGH: Objection. Form.

2 THE WITNESS: My -- this sentence about
3 the -- that it was uncontroversial that the Board
4 felt essential that it address matters of policy
5 referred to specific questions that Custodia
6 raised, but also the Board's repeated insistence
7 in the documents that I reviewed that they were
8 worried about the, quote-unquote, precedent that
9 Custodia's master account access might set for
10 other kinds of engagement with the crypto
11 ecosystem. And I could continue to enumerate
12 those if you'd like.

13 BY MR. MICHAELSON

14 Q Well, let's start going through some of
15 these -- the matters of policy that the Board
16 felt essential to address.

17 So one was the combination of digital
18 asset custody with banking, right? Did the
19 Board -- has the Board, to your knowledge,
20 resolved that policy question?

21 A I don't know.

22 Q You don't know. Sitting here today, do

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1 you know if the Board has concluded that the
2 combination of digital asset custody with banking
3 is okay as long as it's done in a safe and sound
4 manner?

5 A I --

6 MR. SCARBOROUGH: Objection to form.

7 THE WITNESS: I can't say. I would
8 need to -- again, because I can't be confident
9 that your characterization of what the Board has
10 done or hasn't done would match my
11 characterization, I would need to review a
12 document if you've got something -- if you've got
13 something to put in an exhibit. Otherwise, it
14 would be very hard for me to comment on your
15 characterization of the Board's actions.

16 BY MR. MICHAELSON

17 Q Okay. So you've -- you've identified
18 this as a policy question --

19 A Yeah.

20 Q -- that the Board felt essential to
21 assess before deciding Custodia's master account
22 request, right?

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1 A That's right.

2 Q But you don't know what the Board
3 decided in that regard?

4 A Well, assessing and deciding are two
5 very different things. The Board is infamous,
6 perhaps, for taking a long time in assessing new
7 policy ideas. So I don't know where that
8 assessment and its investigation of Custodia's
9 master account access request or its membership
10 application sits vis-à-vis its determination of
11 broader crypto policy questions that it has also
12 undertaken.

13 Q Okay. So sitting here today, you don't
14 know where the Board stands on that policy
15 question?

16 A Not specifically and in the terms that
17 you've identified.

18 Q All right. The second one you
19 identified was combining crypto exchange services
20 with digital banking.

21 Where does the Board stand on that
22 today?

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1 A Again, I'm not sure what their ultimate
2 conclusion would be. I'm not aware of any
3 rulemaking that they've issued under
4 notice-and-comment rulemaking with respect to
5 traditional banking services and crypto-assets,
6 whether specific to that question or any of the
7 other questions listed.

8 My answer is going to be similar for
9 the others if you -- but we're -- I'd be happy to
10 go through them if you like.

11 Q Well, what's another matter of
12 policy -- so we've covered combination of digital
13 asset custody and banking, combination of crypto
14 exchanges with banking.

15 How about issuance of stablecoins?

16 A What do you mean --

17 Q Is that --

18 A -- by stablecoin?

19 Q Well, let's go with a digital asset
20 that is designed to have its value pegged to a
21 dollar. Let's go with that.

22 A Okay. Great. So --

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1 Q First of all, do you know if Custodia
2 was going to do that?

3 A I don't -- I remember reading somewhere
4 in the documents about Custodia's intention to
5 offer a version of a -- of a stablecoin, but
6 let's take your definition for a second.

7 The Board has issued policy -- it's
8 been an enthusiastic endorser of banks issuing
9 digital liabilities that function as assets
10 pegged to the U.S. dollar, and those dominate
11 overwhelmingly the banking system in the United
12 States and are issued by every bank that I know
13 of that issues deposits.

14 Q So that's -- that's a policy question
15 that's been resolved by the Board?

16 A It is.

17 Q And that's in favor of banks doing
18 that?

19 A In favor of banks issuing digital
20 liabilities that function as digital assets that
21 are pegged to the U.S. dollar.

22 Q Even uninsured banks?

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1 A I -- those would be -- uninsured banks
2 that issue deposits, there I don't know, because
3 that's what those would be referring to would be
4 the deposits.

5 Q So you're not sure where the Board is
6 on an uninsured bank issuing a stablecoin?

7 A Well, those -- so, again, I'm taking
8 your definition. I would not call what you call
9 a stablecoin at all. I would call that just
10 dollars, the bank intermediate dollars. That's
11 not a stablecoin. We've had those since the
12 1960s at least.

13 So I don't know what the Fed has said
14 about uninsured banks issuing those kinds of
15 deposits. I'm not sure. Credit card banks might
16 be an example of that, but I'm not sure.

17 Q How about a bank with a master account
18 holding crypto on its balance sheet? Was that a
19 policy question that the Board felt essential to
20 assess before deciding on Custodia's master
21 account request?

22 A Are you considering here in your

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1 question the implications of the affiliated party
2 transactions within bank holding companies and
3 the Bank Holding Company Act that the Federal
4 Reserve considers?

5 Q I'm just talking about an institution
6 with a bank account holding Bitcoin on its
7 balance sheet.

8 A And it's a hard question --

9 MR. SCARBOROUGH: Objection.

10 THE WITNESS: -- to answer, so what
11 I'm -- I'm trying to answer this because the
12 holder -- the specific corporate holder of a
13 master account is not J.P. Morgan. It's Chase
14 National Bank. J.P. Morgan and other affiliates
15 may hold --

16 BY MR. MICHAELSON

17 Q I'm talking about the entity that has
18 the master account.

19 A And is that entity the parent company,
20 or is that the individual sub in your --

21 Q Well, let's --

22 A -- hypothetical?

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1 Q Well, let's go with Custodia. What
2 would it be in Custodia's case?

3 A I don't know. I haven't evaluated
4 Custodia's business model.

5 Q Okay. So was that one of the policy
6 questions that the Board felt essential to assess
7 before deciding Custodia's master account access?

8 A I think --

9 MR. SCARBOROUGH: Objection --

10 THE WITNESS: -- that it --

11 MR. SCARBOROUGH: -- to form.

12 THE WITNESS: -- is -- I think it is
13 one -- I think that one of the policy questions
14 that the Board felt essential to assess was the
15 access to a master account for a financial -- for
16 a depository institution that may also itself or
17 through an affiliated party or subsidiary hold
18 digital assets, cryptocurrencies, on -- on its
19 balance sheet, but again --

20 BY MR. MICHAELSON

21 Q And where did the Board come out on
22 that?

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1 A Same answer I gave you before. I don't
2 know that it has. I think that that
3 conversation -- that question is still being
4 discussed.

5 Q Okay. So, then, is it your testimony
6 that the Board of Governors dictated the denial
7 of Custodia's request before resolving its policy
8 questions?

9 A My testimony is that the Board in its
10 engagement with the Federal Reserve Bank of
11 Kansas City, as it has with other Federal Reserve
12 Banks, dictated the denial of master accounts --
13 of a master account for Custodia before it
14 could -- before it has spoken unequivocally
15 through rulemaking about that question about
16 crypto-assets on a bank's balance sheet and
17 others that are still pending before the Board.

18 Q So -- so it's -- I just want to
19 understand. So Custodia's request implicated
20 matters of policy for the Board to consider. The
21 Board is still considering those, but in the
22 meantime, it dictated the denial of Custodia's

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1 request. That's your testimony?

2 MR. SCARBOROUGH: Objection.

3 THE WITNESS: My testimony is that
4 the -- that Custodia requested master account
5 access, that later it requested membership to the
6 Federal Reserve System on a separate process,
7 that it -- in close succession. It might have
8 been the same day. As I recall, it was denied
9 both. That, meanwhile, the Federal Reserve
10 raised questions of policy about Custodia and its
11 business model and that it still has not resolved
12 one way or the other.

13 BY MR. MICHAELSON

14 Q To your knowledge, did the Board of
15 Governors vote on whether to grant or deny
16 Custodia's master account request?

17 A To my knowledge, they did not vote.
18 Votes of the Board of Governors become public,
19 and I have seen no public vote of the Board of
20 Governors as a body of governors.

21 Now, to be clear, the Board of
22 Governors refers legally and colloquially to two

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1 regard were in writing, in e-mail, by text, oral
2 communication or otherwise, I don't offer an
3 opinion about that.

4 BY MR. MICHAELSON

5 Q Well, you offer an opinion that the
6 Board decided to reject Custodia's master account
7 request, right?

8 A I offer the opinion that the Board
9 controlled the decision and dictated the decision
10 to the Federal Reserve Bank of Kansas City --

11 Q Right.

12 A -- to deny Custodia's --

13 Q Right. But --

14 A -- access request.

15 Q But are you saying they did it without
16 creating any internal paper analyzing the merits
17 or risks associated with Custodia's request?

18 A No.

19 MR. SCARBOROUGH: Objection to form.

20 BY MR. MICHAELSON

21 Q What are you saying?

22 A Well, I'm saying -- I can repeat my

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1 answer from before. It's the same answer.

2 So I'm saying that there will be --
3 there could be a paper trail, oral communication,
4 meetings that were held and the like in reaching
5 this conclusion, but for the very purposes that I
6 identified earlier, that it serves the interests
7 of the Board of Governors to have a private
8 instrumentality to effectuate its own decisions
9 because statutory accountability mechanisms such
10 as FOIA, Sunshine in Government Act,
11 recordkeeping and other things like that apply to
12 the Board, but do not apply to the Reserve Banks.

13 And so for that reason, the Board has a
14 very long history of making decisions that it
15 then implements through the Reserve Banks and
16 disclaiming responsibility for those decisions.
17 And based on the documents I reviewed in TBAS and
18 TNB, I come to the conclusion that consistent
19 with this long history, the Board did the same
20 thing in each of these instances, too.

21 Q So you don't know who at the Board of
22 Governors made the decision to deny. That's your

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1 testimony?

2 A I don't know the single individual who
3 dictated that result, no.

4 Q Okay. Do you know who -- who conveyed
5 that to the federal -- the decision to the
6 Reserve Bank of Kansas City?

7 A I would -- I don't know the name of an
8 individual who did it. I don't know that there
9 was an individual who made the decision instead
10 of a collaboration at the board level in reaching
11 that conclusion.

12 Q Okay. Do you recall -- in reaching
13 your decision -- in your conclusion reflected in
14 your expert report, you didn't rely on any of the
15 testimony from Kansas City personnel, did you?

16 A In reaching my initial expert report,
17 the transcripts of depositions produced in this
18 litigation were not available to me. They did
19 become available to me after the fact, but I did
20 not rely on them because of their lack of
21 availability in -- when I wrote my initial
22 report.

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1 Q Have you -- have you since reviewed
2 testimony from Esther George?

3 A I have reviewed the testimony, the
4 deposition testimony of Esther George.

5 Q Did you review the testimony of Tara
6 Humston?

7 A I reviewed the testimony of Tara
8 Humston, yes.

9 Q Did you review the testimony of Judith
10 Hazen in her personal capacity?

11 A I did review the deposition testimony
12 of Judith Hazen.

13 Q Have you reviewed the testimony of
14 Christi May-Oder?

15 A I think that the testimony -- say the
16 name again.

17 Q Christi May-Oder.

18 A Is she Christi May-Oder -- may I ask,
19 is she the 30(b)(6) corporate representative?

20 Q No, she's not.

21 A No. I believe I did. Is that listed
22 on my supplemental report?

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1 Q Well, let's go with the ones that you
2 remember. Do you remember them all testifying
3 consistently that the president of the Kansas
4 City Fed, Esther George, made the decision to
5 deny Custodia's request?

6 A I remember a lot of different testimony
7 pointing in many different directions with
8 respect to who ultimately made the decision
9 regarding the denial of access to the master
10 account to Custodia.

11 Q Well, do you recall Esther George
12 testifying that she made the decision?

13 A I recall from Esther George's testimony
14 that she described a lot of interactions with the
15 Board of Governors in managing that information
16 flow and -- and then, also, at the end of her
17 deposition, her conclusion when asked whether she
18 made the ultimate decision, and I remember her
19 saying that she did.

20 Q Okay. How do you square that with your
21 opinion in this case?

22 A I relied not only on -- because I'm not

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1 proposed -- each bank is unique in its --

2 Q I see.

3 A -- risk profile, and so I don't know
4 how I would answer that question.

5 Q So your view, then, is that this --
6 this notification -- this -- this comment in the
7 S letter about preliminary notification to Board
8 staff, which makes reference to requests that
9 raise novel issues, that that would encompass
10 every request because every bank raises novel
11 issues?

12 A Elsewhere in either the S letter or in
13 the guidelines -- I think it's the S letter -- it
14 makes clear that even for those banks, the
15 so-called Tier 1 institutions that are not
16 engaged in what the Board calls, quote-unquote,
17 novel forms of banking, may be subject to exactly
18 this kind of searching evaluation.

19 And so it -- there is no limiting
20 principle that I can discern in the S letter or
21 in the guidelines that would give a single bank
22 comfort that it will have a straightforward

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1 process similar to what predominated between 1980
2 and 2015.

3 Q Okay. But let's be clear about what
4 was -- your knowledge of what was happening from
5 1980 to 2015.

6 You have no basis to opine on whether
7 Reserve Banks were conducting risk assessments on
8 institutions that requested master accounts from
9 1980 to 2015, correct?

10 A No, that's not correct.

11 Q Okay. We looked at earlier, for
12 example, the New York Fed policy for high-risk
13 institutions for 2014, right?

14 A We -- we did look at that document,
15 yes.

16 Q Okay. Were you aware of that before
17 today?

18 A I was not aware of that document before
19 today, no.

20 Q Okay. That reflects that Reserve Banks
21 were conducting risk assessments of entities
22 requesting a master account prior to 2015,

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1 correct?

2 A No.

3 Q Okay. So in 2015, when Fourth Corner
4 came around, which is brand new, for the first
5 time, Federal Reserve Bank conducting a risk
6 assessment of an entity requesting a master
7 account?

8 MR. SCARBOROUGH: Objection to form.

9 THE WITNESS: Do you have a question?

10 BY MR. MICHAELSON

11 Q Yeah. Was that -- you're saying that
12 Fourth Corner in 2015 was the first time that a
13 Reserve Bank subjected an entity requesting a
14 master account to any scrutiny or risk
15 assessment?

16 A No.

17 Q Okay. What was happening before 2015?

18 A The public record as we have it based
19 on comments around the time of the creation of
20 the master account, 1998, makes clear that there
21 was some kind of process that occurred, but in
22 the -- and I don't have the exact words, but I'll

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1 paraphrase -- that in the usual or majority of
2 cases or in most cases or something like that,
3 something to reflect the majority of cases, this
4 would -- it would be, quote-unquote, routine,
5 and, indeed, the time specified was five business
6 days.

7 What was happening in those five
8 business days, I couldn't say, and it may well be
9 that there was a, quote-unquote, risk assessment,
10 as you said, occurring within that period.

11 What happened in 2015, which was new,
12 and that the 2014 New York letter that you showed
13 me today does not dispute, is that a denial of
14 access to a legally eligible depository
15 institution occurred not because there was new
16 risk assessment -- that may or may not have been
17 taking place in cases prior to 2015 -- but that
18 that risk assessment or policy consideration led
19 ultimately to the denial of master account
20 access.

21 Q Can you think of any institution that
22 requested a master account from 1980 to 2015

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1 that -- that would be denied today in light of
2 what you describe as a shift in approach toward
3 master account requests?

4 A Because the guide -- the S letter and
5 the guide -- and the handbook are so broad --
6 sorry -- the S letter and the -- and the
7 guidelines are so broad, I can't be certain, but
8 I have a strong suspicion that, yes, the answer
9 to that is yes.

10 And what I have in mind here in
11 particular is the advent of Internet banking,
12 which was brand new in the 1990s, and included
13 the kinds of things that we take for granted in
14 2023 with respect to digital banking services
15 that are executed exclusively over the Internet.

16 These are -- the very kinds of issues
17 that are implicated, including through changes in
18 monetary policy regimes, changes which occurred
19 in 1984, occurred again in 1993, occurred again
20 in 2008, that -- it would implicate these
21 principles.

22 My answer to your question, then, is

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1 A Okay.

2 Q Page FRBAR19, end of the first
3 paragraph, after -- in Section A. "The original
4 proposal was also intended to ensure that Reserve
5 Banks apply a transparent consistent set of
6 factors when reviewing requests for access to
7 accounts and services."

8 A I see that, yes.

9 Q Okay. So if -- if the goal of -- if
10 the goal of guidelines is to promote consistency
11 in decision-making across Reserve Banks, wouldn't
12 it make sense to ask Reserve Banks to consult
13 with the Board with respect to requests that
14 could result in variation across the Reserve
15 Banks?

16 MR. SCARBOROUGH: Objection to form.

17 THE WITNESS: I -- I -- I don't have
18 insights into the appropriate institutional
19 design for consistency. I do know how the Board
20 behaved, not only in what it described in the
21 guidelines and S letter, but also in the specific
22 case of Custodia.

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1 For example, even on, quote-unquote,
2 internal deliberations within the Federal Reserve
3 Bank of Kansas City, these consultative processes
4 that they are talking about were not
5 consultative, but much more controlled.

6 So, for example, in the documents I
7 requested from the research staff at Williams &
8 Connolly, I was able to review, which I describe
9 in my report, a redline document that was
10 redlined by the Board, though it was written by
11 Kansas City Fed staff directed to Kansas City Fed
12 President Esther George and yet had significant
13 amendations by the Board, including the
14 elimination of reference to those very
15 consultations with the Board.

16 Now, consultations are one thing, but
17 if consultations turn into veto points, which, as
18 I document in my supplemental report, is exactly
19 what happened with the S letter and the
20 guidelines and as we have seen in the case of
21 Custodia, that is no longer consultation. That's
22 control. And that's the difference. This -- I

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1 don't see in the guidelines or in the S letter a
2 courtesy call. I see mandates and I see ultimate
3 decision-making authority in the Board of
4 Governors.

5 Q So is it your opinion that the Board of
6 Governors vetoed the Reserve Bank's decision to
7 grant Custodia's master account request?

8 A No.

9 Q Okay. And where do you see a mandate
10 from the Board of Governors that the Federal
11 Reserve Bank of Kansas City must deny Custodia's
12 master account request?

13 MR. SCARBOROUGH: Objection to form.

14 THE WITNESS: Is my supplemental report
15 an exhibit in the record?

16 MR. MICHAELSON: No, but it can be.
17 We're marking your supplemental report as Exhibit
18 307.

19 (Deposition Exhibit Number 307 was
20 marked for identification.)

21 THE WITNESS: Thank you.

22

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1 only be produced at the end of a process by one
2 of the Federal Reserve Banks.

3 Why the Federal Reserve Board of
4 Governors has structured this process with those
5 two if -- to have those two effects is something
6 you'd have to ask the representatives of the
7 Board of Governors --

8 MR. MICHAELSON: And --

9 THE WITNESS: -- to clarify.

10 BY MR. MICHAELSON

11 Q And the result of that would be that
12 the Reserve Bank could get sued, as it has been
13 here, and be subject to rules of civil discovery
14 without limitations of a record review case?

15 MR. SCARBOROUGH: Objection.

16 THE WITNESS: There are -- there are
17 all -- there are all kinds of statutes and
18 authorities and provisions that apply to the
19 Board of Governors that by their terms do not
20 apply to the Federal Reserve.

21 There's a reason that you are here and
22 not representatives of the Department of Justice.

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1 There are reasons why your client has dot org
2 e-mail instead of a dot gov e-mail. There are
3 reasons why FOIA does not apply to the Federal
4 Reserve Banks, and there are -- even within the
5 Monetary Control Act itself, there are different
6 elements that point to the Board versus the
7 Reserve Banks.

8 The structure of this process has the
9 effect -- I don't comment on the intention -- has
10 the effect of putting all accountability at the
11 dot org private lawyer, non-FOIA, in different
12 parts of the MCA, with all of the control in the
13 dot gov subject to FOIA, public agency and
14 decision-making.

15 The Federal Reserve System and the
16 Board of Governors is seeking in this process to
17 have its cake and eat it, too, and that's the
18 opinion that I offer in my expert opinion that --
19 in my -- in my expert report that the Board both
20 controls and obscures its participation in the
21 denial of master account access.

22

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1 BY MR. MICHAELSON

2 Q And to do that, they have to make
3 decisions on master account requests from novel
4 institutions like Custodia without leaving a
5 paper trail that can be subject to FOIA, right?

6 MR. SCARBOROUGH: Objection to form.

7 THE WITNESS: No.

8 BY MR. MICHAELSON

9 Q Well, wouldn't their documents be
10 subject to FOIA?

11 A Well --

12 Q Isn't that what you're saying?

13 A As a Fed historian who has been on the
14 sharp end of any number of FOIA request denials
15 at of the Board of Governors, I'm not saying that
16 FOIA represents a disclose all your documents
17 mechanism.

18 I will say -- and my earlier testimony
19 is consistent with this view -- that the paper
20 trail, so to speak, does include the exact kind
21 of exchange of information that's outlined in the
22 process in the S letter and -- and guidelines.